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PROTON EDAR SDN BHD v. MULTIOTO ASSIST SDN BHD

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
HAMID SULTAN ABU BACKER JCA
UMI KALTHUM ABDUL MAJID JCA
B [CIVIL APPEAL NO: B-02-1404-06-2013]
15 APRIL 2015

CIVIL PROCEDURE: *Pleadings – Matters not pleaded – Findings by judge on matters not pleaded – Dispute arising from agreement – Judge ordered assessment* C *of damages on quantum meruit basis – Whether a contract was executed between parties – Whether damages on quantum meruit basis pleaded – Whether there was evidence of benefit*

The appellant ('the defendant') had executed 'Heads of Agreement' with KLF Multioto Sdn Bhd which was assigned to the respondent ('the plaintiff'). D Based on the agreement, the plaintiff ('the respondent') said it was to be the exclusive service provider subject to a formal definite agreement. However, the said formal agreement was not executed. Under the 'Heads of Agreement', the defendant would not be liable for any monetary payment. The issue which arose for determination in the High Court, *inter alia*, was E whether there was a contract between the plaintiff and the defendant since no formal contract was executed. Satisfied that the plaintiff had proved his claim on the balance of probabilities, the High Court held in favour of the plaintiff and ordered an assessment of damages on *quantum meruit* basis. Hence, the present appeal. The defendant contended that it was not the F pleaded case of the plaintiff to seek damages on *quantum meruit* basis.

Held (allowing appeal with costs; setting aside judgment of High Court) Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) There was no concluded contract. It was also a condition precedent of G the 'Heads of Agreement' the need for a concluded contract. When the intention of the parties was clear that there must be a concluded contract, contractual jurisprudence does not permit the court to rewrite the agreement between the parties, unless exception applies. (para 10)

(2) The judgment could not be sustained as *quantum meruit* was not the H pleaded case of the plaintiff. Furthermore, the law does not permit the court to assess damages based on *quantum meruit* when there was no evidence to say the defendant had any benefit. (paras 5 & 10)

Bahasa Malaysia *Translation Of Headnotes*

I Perayu ('defendan') telah memeterai 'Heads of Agreement' dengan KLF Multioto Sdn Bhd yang diberikan kepada responden ('plaintif'). Berdasarkan perjanjian tersebut, plaintif ('responden') menyatakan bahawa ia adalah pembekal perkhidmatan eksklusif tertakluk kepada perjanjian formal yang

termaktub. Namun begitu perjanjian rasmi tidak dimeterai. Di bawah 'Heads of Agreement', defendan tidak akan bertanggungan bagi pembayaran berbentuk wang. Isu yang ditimbulkan bagi pemutusan di Mahkamah Tinggi, antara lain, adalah sama ada terdapat kontrak antara plaintif dan defendan memandangkan tiada kontrak rasmi yang dimeterai. Berpuas hati bahawa plaintif telah membuktikan tuntutannya atas imbangan kebarangkalian, Mahkamah Tinggi memutuskan berpihak kepada plaintif dan memerintahkan taksiran ganti rugi atas dasar *quantum meruit*. Oleh itu, rayuan ini. Defendan menghujahkan bahawa plaintif tidak memplidkan untuk memohon ganti rugi atas dasar *quantum meruit*.

Diputuskan (membenarkan rayuan dengan kos; mengenepikan penghakiman Mahkamah Tinggi)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Tiada kontrak yang termaktub. Adalah menjadi pra-syarat 'Heads of Agreement' bagi satu kontrak yang termaktub. Apabila niat pihak-pihak jelas bahawa mesti terdapat kontrak yang termaktub, jurisprudens kontraktual tidak membenarkan mahkamah menulis semula perjanjian antara pihak-pihak melainkan pengecualian terpakai.

(2) Penghakiman tidak boleh dikekalkan kerana *quantum meruit* bukanlah kes yang diplidkan oleh plaintif. Tambahan lagi, undang-undang tidak membenarkan mahkamah mentaksir ganti rugi berdasarkan *quantum meruit* apabila tiada keterangan untuk menyatakan bahawa defendan telah menerima manfaat.

Case(s) referred to:
Aberfoyle Plantations Ltd v. Khaw Bian Cheng [1959] 1 LNS 3 PC ***(refd)***
Attorney General of Hong Kong v. Humphreys Estate (Queen's Gardens) Ltd [1987] 1 AC 114 ***(refd)***
Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises [1994] 3 CLJ 133 SC ***(refd)***
Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***
Kam Mah Theatre Sdn Bhd v. Tan Lay Soon [1994] 1 CLJ 1 SC ***(refd)***
Lin Wen-Chih & Anor v. Pacific Forest Industries Sdn Bhd & Anor [2008] 5 CLJ 29 CA ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***
Md Hamid Merican Abdul Kader Merican v. Abdul Razak Hussain & Ors [2010] 1 LNS 487 HC ***(refd)***
Nga Sheau Sheau v. United Merchant Finance Bhd [2004] 3 CLJ 243 HC ***(refd)***
Pembinaan SPK Sdn Bhd v. Jalinan Waja Sdn Bhd [2014] 2 MLJ 322 ***(refd)***
Soo Lip Hong v. Tee Kim Huan [2005] 4 CLJ 119 CA ***(refd)***

For the appellant - Robert Lazar (Toi Tee Toen, Sanjay Mohanasundram & K Gobinath with him); M/s Kadir, Andri & Partners
For the respondent - Jei Sooria V; M/s Othman Hashim & Co

[Appeal from High Court, Shah Alam; Civil Suit No: MT4-22-671-2004]

Reported by Najib Tamby

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JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant/defendant appealed against the decision of the learned High Court Judge who had ordered assessment of damages on *quantum meruit* basis when it was not the pleaded case of the respondent/plaintiff, that too where upon finding there was no concluded contract and the points of agreement which the plaintiff had relied on had expired.

[2] We heard the appeal on 2 October 2014 and were unanimous in allowing the appeal. My learned brother Abdul Wahab bin Patail JCA and learned sister Umi Kalthum binti Abdul Majid JCA had read the draft judgment and approved the same. This is our judgment.

Preliminaries

[3] The learned trial judge had written an eight pages judgment in a style citing no authorities for the various propositions made by the judge or the counsel in the matter, making it difficult for appellate assessment on the decision. On the issue related to the case, the learned trial judge said:

> Isu yang timbul di sini ialah sama ada telah wujudnya satu kontrak antara Plaintif dan Defendan memandangkan tiadanya kontrak rasmi dilaksanakan dan adakah kontrak tersebut telah termaktub (included) untuk plaintif dilantik sebagai "Exclusive Service Provider" untuk projek PETA? Juga, sama ada Plaintif telah diarah untuk meneruskan dengan projek PETA oleh Defendan walaupun tiada perjanjian yang pasti (definite) untuk dilaksanakan oleh pihak-pihak?

[4] On the issue of liability and quantum, the learned trial judge said:

> Setelah mendengar keterangan saksi-saksi dan setelah meneliti hujahan dari kedua-dua pihak, saya dapati Plaintif telah dapat membuktikan tuntutannya atas imbangan kebarangkalian, oleh itu saya telah memberikan penghakiman kepada Plaintif atas isu liabiliti dan jumlah ganti rugi atas dasar 'on *meruit* basis' dan kos ditaksirkan oleh Pendaftar.

[5] On the face of the record, the judgment cannot be sustained as it was not the pleaded case of the plaintiff to seek damages on *quantum meruit* basis. In addition, it was not the pleaded case of the plaintiff that the defendant did enjoy the benefit of the plaintiff's service or contribution. There was also no finding by the learned trial judge that the defendant benefited in consequence of the plaintiff's service and/or contribution. In fact, the defendant's defence in paras. 4 to 5 was not challenged or debunked by the plaintiff in any material form for the plaintiff to succeed when the defendant's evidence in the trial was consistent with the statement of defence. That part of the defence reads as follows:

> 4. With regard to paragraphs 7 to 14 of the Statement of Claim, the Defendant will aver that:

(a) it was never the understanding between the Defendant and KLF Multioto Sdn Bhd and thereafter the Plaintiff that the Defendant would be liable for any work done by KLF Multioto Sdn Bhd or the Plaintiff in furtherance of the establishment of the PETA program or the appointment of KLF Multioto Sdn Bhd or the Plaintiff as exclusive service provider under the said program. The Defendant may have in certain limited circumstances been aware of and assented to some steps taken by KLF Multioto Sdn Bhd or the Plaintiff as set out below in furtherance of their own efforts to prepare for and establish their part of the PETA program but it was always on the basis that any such expenses were incurred by KLF Multioto Sdn Bhd or the Plaintiff at their own risk and were to be borne by them and not by the Defendant. The original and continuing concept of the PETA program was that the Plaintiff was to derive its income and profit from subscriptions and associated services like towing, sales of genuine parts, servicing and repairs for owners of vehicles who subscribed to their services. No costs or expenses were ever to have been borne by the Defendant in any circumstances;

(b) The Defendant has not derived any benefit from the work done by KLF Multioto Sdn Bhd or the Plaintiff as the Defendant did not proceed to implement the PETA program with the Plaintiff as the service provider;

(c) Whilst the Plaintiff may have proceeded to purchase equipment and software and to employ staff, the Defendant has no specific details of what was done. In any event, all these matters and expenses related thereto were acts and expenses undertaken at their own risk;

(d) Although the Defendant did approve the design of the PETA membership cards, car stickers, car reflectors, application forms, brochures and uniforms, the Defendant did not instruct or authorise the Plaintiff to proceed with the manufacturing or printing of the same;

(e) The Defendant has no knowledge of any sums paid by the Plaintiff to KLF Multioto Sdn Bhd for the rights to the PETA program. This is an internal matter between KLF Multioto Sdn Bhd and the Plaintiff which does not involve the Defendant. When the Plaintiff sought the Defendant's approval to take over the negotiations for the PETA program, the Plaintiff never informed the Defendant that they were paying for the privilege to do so and the Defendant never agreed to be held liable or responsible for any such payment;

(f) The Defendant also do not have any knowledge of deposits paid by the Plaintiff for utilities, advertising and promotion and rental or of any form of financing obtained by the Plaintiff or the purpose of such financing;

(g) The Defendant does not have any knowledge of any operating costs incurred by the Plaintiff;

(h) Save as set out above, paragraphs 7 to 14 of the Statement of Claim are denied.

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> 5. Paragraph 15 of the Statement of Claim is denied. No contract had ever been concluded between the Plaintiff and the Defendant. Accordingly, the Plaintiff is not entitled in law to the sum of RM7,200,000.00 or any sums whatsoever.

Brief Facts

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[6] We do not think much judicial time should be expended to set out the facts and law as it has been well articulated by learned counsel for the appellant/defendant.

[7] In the instant case, the defendant had executed "heads of agreement" with KLF Multioto Sdn Bhd which was assigned to the plaintiff. Based on the agreement, the plaintiff/respondent said it was to be the exclusive service provider subject to a formal definitive agreement. The said formal agreement was not executed. It was a condition precedent that a formal agreement must be executed. It was also not in dispute that "heads of agreement" had lapsed. In addition, it must be noted under the heads of agreement the defendant will not be liable for any monetary payment and that part of the defendant's defence has been set out earlier. We do not wish to repeat.

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[8] Learned counsel for the defendant stated the main issues for the determination are as follows:

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> (a) Whether there was any concluded agreement between the appellant and the respondent?;
>
> (a) Whether the respondent was instructed to proceed with the project by the appellant?; and
>
> (b) Whether the respondent is entitled to claim based on *quantum meruit*?

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And submitted as follows:

> If any of these issues are answered in the negative, the appeal must be allowed. The first issue is one of interpretation of a document, which is a question of law, and that it is clear that there was no concluded agreement between the parties which entitles the Respondent to recover any monies from the Appellant. As regards the second issue, it is clear from the evidence before the Court below that no instruction to proceed was ever issued. As regards the third issue, the issue of recovery on a *quantum meruit* basis was never pleaded by the Respondent, nor otherwise raised before the parties closed their respective cases.

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[9] Learned counsel for the plaintiff/respondent did not dispute that there are only three issues and the above submission of the appellant in material form. The respondent's main line of argument was that it was a finding of fact by the trial judge, even though they agreed that the *quantum meruit* was not pleaded. However, they stated that the conduct of the defendant to allow the plaintiff to perform the task with their knowledge entitled them (the plaintiff) to succeed in their claim.

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[10] We have read the appeal record and the submission of the parties in detail. We thank learned counsels for the comprehensive submission. After much consideration to the submission of the plaintiff's counsel, we took the view the appeal must be allowed. Our reasons, *inter alia,* are as follows:

(a) in the instant case, there is no concluded contract. It is also a condition precedent of the "heads of agreement" the need for a concluded contract. When the intention of the parties are clear that there must be a concluded contract, contractual jurisprudence does not permit the court to rewrite the agreement between the parties, unless exception applies such as was discussed in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719. Support for the proposition is found in a number of cases, to name a few are as follows:

(i) *Soo Lip Hong v. Tee Kim Huan* [2005] 4 CLJ 119; [2006] 2 MLJ 49;

(ii) *Lin Wen-Chih & Anor v. Pacific Forest Industries Sdn Bhd & Anor* [2008] 5 CLJ 29;

(iii) *Aberfoyle Plantations Ltd v. Khaw Bian Cheng* [1959] 1 LNS 3; [1960] 1 MLJ 47;

(iv) *Nga Sheau Sheau v. United Merchant Finance Bhd* [2004] 3 CLJ 243;

(v) *Attorney General of Hong Kong v. Humphreys Estate (Queen's Gardens) Ltd* [1987] 1 AC 114;

(vi) *Kam Mah Theatre Sdn Bhd v. Tan Lay Soon* [1994] 1 CLJ 1; [1994] 1 MLJ 108;

(vii) *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises* [1994] 3 CLJ 133; [1994] 2 MLJ 754;

(viii) *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625; [1996] 3 MLJ 327.

(b) *Quantum meruit* was not the pleaded case of the plaintiff and the law does not permit the court to assess damages based on *quantum meruit* when there was no evidence to say the defendant had any benefit. Support for the proposition is found in a number of cases, to name a few are as follows:

(i) *Pembinaan SPK Sdn Bhd v. Jalinan Waja Sdn Bhd* [2014] 2 MLJ 322;

(ii) *Md Hamid Merican Abdul Kader Merican v. Abdul Razak Hussain & Ors* [2010] 1 LNS 487; [2010] 9 MLJ 1.

(c) The defendant's submission on this issue has merits. The defendant's submission reads as follows:

> No evidence that the appellant had benefited from the respondent's alleged work.

39. The Appellant further submits that the Respondent is obliged to prove that the Appellant had benefited from the Respondent's alleged work in order to succeed in a claim premised on a *quantum meruit* basis. No such proof was adduced before the Court below.

40. The Appellant submits that a claim premised on *quantum meruit* basis is derived from the principles of restitution which were developed by common law. In Malaysia, section 71 of the Contracts Act 1950 governs these principles which provide as follows:

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

41. Section 71 of the Contracts Act 1950 (formerly known as Section 71 Contracts (Malay States) Ordinance 1950) was considered by the Privy Council in *Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118 wherein the Privy Council held that:

> It has been common ground before their Lordships that four conditions must be satisfied to establish a claim under section 71. The doing of the act or the delivery of the thing referred to in the section:-
>
> (1) Must be lawful;
>
> (2) Must be done for another person;
>
> (3) Must not be intended to be done gratuitously;
>
> (4) Must be such that the other person enjoys the benefit of the act or the delivery.
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> In their Lordships' judgment, these matters must be answered at the time that the act is done or the thing delivered and this, their Lordships think, is of fundamental importance.

42. Premised on the above, the Appellant submits that the Respondent must satisfy the four conditions as set out above to prove a claim under *quantum meruit* basis.

43. It is to be noted that there is no evidence produced by the Respondent to prove that the Appellant had used its designs and artwork or enjoyed the benefit of the Respondent's alleged work. The Respondent did not produce any documents to show that the Appellant had used the Respondent's designs and artwork or benefited in some other ways as a rebuilt of the Respondent's designs and artwork. The burden is on the Respondent which they have failed to do so. In *Akitek Berjasa v. City Motors Sdn Bhd & Anor* [1986] CLJ (Rep) 271 at page 275, Eusoff Chin J (as he then was) held that:-

> The Plaintiff's Counsel in his submissions asked the Court to at least consider whether the plaintiff should be paid a reasonable sum on a *quantum meruit*. I do not think that the plaintiff is entitled to that either. To succeed on this, the plaintiff has to prove that the defendants had derived some benefits from the work performed by the plaintiff. The defendants had obtained no benefit at all under the agreement.

[11] On the factual matrix of the case, the pleadings of the parties as well as the evidence, we did not think any form of liability could be attached to the appellant/defendant.

[12] For reasons stated above, we allowed the appeal with costs of RM30,000 to be paid by the respondent/plaintiff to the appellant/defendant here and below. The judgment of the High Court was set aside. The deposit was refunded.